Cassels

2019: The Year in Review in Employment Law

Kristin Taylor

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Our review last year kicked off by noting that 2018 had been an exceptionally eventful year in employment law. 2019 has been no less so, although the developments have been different. Many of 2018's changes were legislative. While 2019 may have been quieter for Ontario employers on the legislative front, it was busy for employers with operations in Alberta and British Columbia as well as for employers who are federally-regulated. In Ontario, employers have continued to grapple in the courts over termination entitlements. The Ontario Court of Appeal has been prolific on employment issues this year seeking to provide clarity and presumably to reduce their case load. Two decisions released December 17, 2019, and described below, provide helpful guidance to employers on these issues.

These are 2019's most notable developments in employment law:

1. Statutory Changes

Ontario

In April 2019, Bill 66 received royal assent increasing the ability of employers to internally regulate their workplaces without government interference. These changes had been announced in December 2018 and include not having to display ESA posters or to apply to the Director of Employment Standards for approval to work excess hours or average overtime. All of the other legislative changes to employment and labour relations legislation, including those that froze minimum wage (until October 2020), and repealed personal emergency leave and scheduling requirements were previously implemented in November 2018. For additional details, please see *Bill 66 Becomes Law in Ontario*.

There have been no new announcements regarding the implementation of the *Pay Transparency Act*. It is only reasonable to assume it has been delayed indefinitely.

Ontario public sector employers face new caps on salary increases of 1% per year for the next three years with the *Protecting A Sustainable Public Sector for Future Generations Act, 2019*.

Last, while these changes aren't new, it is worth noting that there are upcoming deadlines under the *Accessibility for Ontarians with Disabilities Act* (AODA). For additional details, please see *Upcoming Reporting Deadlines and Accessible Website Requirements Under the AODA*.

Alberta

Albertans elected a majority United Conservative party government in April 2019 that immediately set about changing minimum standards legislation, including a reduction in minimum wage and reducing lieu time entitlements. For additional details, please see *Recent and Upcoming Changes to Federal and Provincial Minimum Standards*.

British Columbia

British Columbia's NDP government, elected in 2017, made extensive amendments to its employment standards legislation, including the addition of new leaves of absence, expansion of unpaid wage liability from six to 12 months and records retention rules. For additional details, please see *Recent and Upcoming Changes to Federal and Provincial Minimum Standards*.

Federally-Regulated Employers

The most extensive and employee friendly changes were implemented to the *Canada Labour Code* in 2019 and apply exclusively to federally-regulated employers. These changes include additional employee rights in connection with shift changes, requesting flexible work arrangements, additional leave entitlements (including personal leaves, leave for traditional Aboriginal practices, bereavement leave, medical leave and court/jury duty leave), breaks and the new Canadian highwater mark for vacations that requires four weeks of paid vacation after 10 years of service. For additional details, please see *Recent and Upcoming Changes to Federal and Provincial Minimum Standards*.

2. Termination Clauses

The debate over the enforceability of termination clauses has continued to rage with the Ontario Court of Appeal (ONCA) weighing in with two decisions on the effect of saving or "failsafe clauses." A proper "failsafe" clause provides that, no matter what happens, the employee will receive their minimum entitlements under the ESA on termination of their employment. In the *Andros v. Colliers Macaulay Nicolls Inc.* case, the ONCA found that the failsafe language in the termination clause was optional for the employer; it did not set the necessary floor. For additional details, please see *Termination Clauses Revisited – ESA "Failsafe" Language May Not be as Failsafe as You Think*.

More recently, in a decision released December 17, 2019, the ONCA provided further clarity, in *Rossman v. Canadian Solar Inc*., 2019 ONCA 992. In this case, the termination clause contained a failsafe clause that provided that minimum statutory requirements would replace the notice of payments in lieu of notice contemplated under the agreement and then went on to state that benefits would cease four weeks from the written notice. This later statement would become unenforceable once the employee completed five years of

service. The ONCA determined that a potential violation in the future is sufficient to contravene the ESA and render a clause unenforceable. As a result, even though the employee's statutory entitlement at the time his employment terminated was limited to three weeks of pay and benefits, the future invalidity of the clause rendered it unenforceable. The ONCA observed that saving provisions cannot save employers who attempt to contract out of the ESA's minimum standards to exploit vulnerable employees.

3. Arbitration Clauses in Agreements

The ONCA weighed in on the issue of the enforceability of arbitration clauses in a class action brought by an Uber driver who sought to declare that Uber and UberEATS drivers are employees of Uber and that the terms and conditions of their driver agreements, including an arbitration only clause, violated the ESA and are, therefore, unenforceable. The arbitration clause required that "any dispute, conflict or controversy … be first mandatorily submitted to mediation proceedings … and shall be exclusively and finally resolved by arbitration." The place of arbitration was defined as Amsterdam, the Netherlands. While the motion judge enforced the arbitration clause and stayed the action in favour of arbitration, the ONCA disagreed determining that it contracted out of the ESA. The critical finding was that the arbitration clause denied individuals the right to use the investigative process under the ESA. This finding will apply to most, if not all, standard arbitration clauses that many global employers seek to include in their employment agreements. Accordingly, they will not be enforced in Canada. Uber appealed the ONCA decision and the appeal was heard by the Supreme Court of Canada on November 6, 2019. We expect a decision in early 2020. See *Heller v. Uber Technologies Inc*., 2019 ONCA 1.

4. Employer Liability on Termination

The ONCA also weighed in with a consistent message for employers with respect to their liability on termination: treat employees fairly at the time they are vulnerable and you will not be required to pay more than 24 months' reasonable notice. Also consistent has been their message on the components of compensation to be included in that reasonable notice period.

Where an Ontario employer dismissed its President for cause for alleged fraud without any details and threatened to counterclaim against him if he hired a lawyer, at first instance, the trial judge awarded 19 months' pay in lieu of notice plus $100,000 in punitive damages, $25,000 in aggravated damages and almost $550,000 in costs. The ONCA dismissed the employer's appeal in its entirety. This decision is the perfect example of the hazards of engaging in bad faith and hardball tactics on the termination of an employee's employment. For additional details, please see *Ontario Court of Appeal Upholds Extraordinary Award in Wrongful Dismissal Case*.

The 24 month notice limit was reinforced by the ONCA in a decision reversing a motion judge's imposition

of a 30 month notice period with the concerning comment that he would have felt the case "warranted a minimum 36 month notice period," but the employee had only asked for 30. The employee in question was a 62-year-old Senior Vice President with 37 years of service. The ONCA found that, in the absence of exceptional circumstances, the presumptive standard of 24 months was appropriate. For additional details, please see *Keeping A Lid On It – Ontario Court of Appeal Reinforces 24 Months as Presumptive Limit for Reasonable Notice Awards*.

In a decision released December 17, 2019, the ONCA reinforced that equity components of an employee's compensation will continue for the reasonable notice period barring contractual terms that unambiguously remove that right. In the particular case at issue, *O'Reilly v. IMAX Corporation*, 2019 ONCA 991, at trial, a senior executive was awarded damages for salary, commissions, pension contributions, benefits and lost opportunity to exercise awards of restricted stock units (RSUs) and stock options granted under a Long Term Incentive Plan (LTIP) during the reasonable notice period. The employer appealed the award as it related to RSUs and stock options on the basis that the LTIP language meant these awards were cancelled on the effective termination date. The ONCA disagreed relying on a number of its own decisions on this topic. The LTIP in this case did not establish "in unambiguous terms, when the date of termination is or when employment terminates." Accordingly, having left open the possibility that termination could have occurred at the end, rather than the beginning of the notice period, the language was interpreted as mandating a lawful termination (i.e., the end of the notice period). In 2020, the Supreme Court of Canada will weigh in on the issue of whether long-term incentive payments should continue to accrue during the notice period in the appeal of a decision from the Nova Scotia Court of Appeal (*Ocean Nutrition Canada Ltd. v. Matthews*, 2018 NSCA 44).

It also is important to note that this is a different result than that reached by the ONCA in *Mikelsteins v. Morrison Hershfield Limited*, 2019 ONCA 505. In this case, the ONCA reversed the motion judge's finding that the employee was entitled to compensation in respect of shares awarded in accordance with a shareholders' agreement for the reasonable notice period. This case determined that contractual rights differ from common law rights and common law had no application to the shareholders' agreement. Accordingly, the reference to "termination … of employment" in the shareholders' agreement was not required to meet the ambiguity test and there was no presumption of continuation until lawful termination occurred. Rather, the ONCA noted the "very plain and obvious reason" why an employer would wish to commence the process of repurchasing shares the moment the employee is told of dismissal, rather than the end of the notice period. The distinction between shareholders and employees is an important one.

5. Cannabis / Drug Testing

Many employers anticipated the legalization of cannabis that occurred October 17, 2018, to wreak havoc in their workplaces. Over a year later, most would say that it has not done so. This is particularly the experience of employers who updated their drug and alcohol policies and reminded employees that they

would not tolerate impairment in the workplace.

Of particular note on the issue of drug testing in the workplace, is Supreme Court of Newfoundland and Labrador's January 2019 judicial review of a labour arbitrator's decision, in *International Brotherhood of Electrical Workers, Local 1620 v. Lower Churchill Transmission Construction Employers' Association Inc*., 2019 NLSC 48. The arbitrator had found a limit to the accommodation to be considered for employees who use medically prescribed cannabis in safety-sensitive workplaces. The critical finding by the arbitrator was that "the inability to measure and manage the risk of harm constitutes undue hardship for the Employer." The Court, on the application for judicial review, found the arbitrator's decision to be within the range of reasonable outcomes and, therefore, upheld the decision. We understand this decision is being appealed further.
